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Supreme Court of the United States

OCTOBER TERM, 1970

No. 128

IN RE BARBARA BURRUS, et al.,

Petitioners.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

REPLY BRIEF FOR PETITIONERS

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Petitioners have received the briefs of the State of North Carolina and various amici curiae and herewith file their reply.

ARGUMENT

NEITHER THE ADJUDICATIVE PHASE OF JUVENILE COURT PROCEEDINGS NOR THE CHARACTER OF STATE JUVENILE INSTITUTIONS ARE SUFFICIENTLY DISTINGUISHABLE FROM CRIMINAL PROCEEDINGS, OR INCARCERATION AS TO JUSTIFY DENIAL OF TRIAL BY JURY TO THOSE CHARGED WITH DELINQUENCY.

In essence, North Carolina, and those amici who support the State's position, argue that denying jury trials to juve-

niles on the question of whether they are delinquents by reason of violation of state criminal laws results from a proper balancing of the equities. The State and amici contend, primarily, that the purpose of the juvenile court system is rehabilitative and thus its operation is to be distinguished from criminal proceedings; that a jury trial will result in a loss of confidentiality (which will in itself impair the rehabilitative purposes of the juvenile court system); and that the availability of jury trials will result in delays in adjudication and, therefore, in the availability of rehabilitative services.

Initially, it should be observed that regardless of the quality of rehabilitative services in fact made available by the State to youth, incarceration that follows juvenile court proceedings cannot be considered exclusive of punishment of the juvenile, *In re Gault*, 387 U.S. 1, 27 (1967).[1] Whether for his own good or not, the youth is labelled a law breaker, held against his will and subject to an institutional regime 24 hours a day. Although in its brief North Carolina states that "rehabilitation is the juvenile court's polar star" the State is about as far from realizing this laudable goal in the administration of its juvenile correctional institutions as from the north star itself. Recent research undertaken in North Carolina juvenile institutions simply fails to support the notion that the State treats its children so differently from its adults as to justify denial of trial by jury to the young (even assuming some rational relationship between provision of benefits in a training school and safeguards that are to attend the adjudicative phase).

Such rehabilitative services available to juveniles are provided in the familiar institutional context employed for both young and old convicted of crime; the quality of services and facilities offered is hardly likely to result in a substan-

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[1] It would likewise be inaccurate to suppose that adult penal institutions, in North Carolina and elsewhere, do not present rehabiliative opportunities to inmates. In both adult and juvenile cases the decisions of sentencing judges and the operation of custodial institutions reflect the varied purposes of criminal sentencing.

tial benefit being conferred on the youth. This picture of juvenile detention in North Carolina emerges clearly from *A Report on the North Carolina Juvenile System: Courts, Corrections, and Aftercare*, Duke Center on Law and Poverty (hereafter Duke Report) (mimeo, 1969).[2] The study illustrates well the conclusion reached by this Court that:

> It is of no constitutional consequence—and of limited practical meaning—that the institution . . . [in which] a youth] is committed is called an Industrial School. *In re Gault*, 387 U.S. 1, 27 (1967).

The Duke Report found that detention was most plainly penal in nature at the C.A. Dillon School, which houses those "youngsters who present problems at the State's seven other training schools" (Duke Report, 182).[3] Dillon reflects the "orthodox maximum security principles of penology" (*Ibid.*). Unlike the seven other institutions, it is surrounded by a fifteen-foot cyclone fence with double barbed wire at the top:

> Every child lives in a small individual cell. He sleeps on an indestructable and immovable bed under an inaccessible light fixture that remains dimly lit throughout the night . . . He may look out the

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[2]The report was prepared by the Duke Center on Law and Poverty of Duke University School of Law under a grant from the United States Office of Economic Opportunity and it represents the codification of research and interviews as well as site visits to the state's eight training schools. An observer spent one week each at the four boys' schools (Eastern Carolina School for Boys, Stonewall Jackson Training School, Samuel Leonard Training School and Morrison Training School). One-day visits were made to the remaining institutions (C.A. Dillon School, Juvenile Evaluation Center, Dobbs Farm, and Samarcand Manor).

[3]In an article describing the study, one researcher reported that other state training schools are only quantitively different from Dillon, and more akin to "low-security prison camp[s] than they are to enlightened institutions envisioned in the General Assembly's legislation and the North Carolina Supreme Court's opinions." Hough, "*Unconstitutionality of the North Carolina Reformatories*," 14 (Duke Center on Law and Poverty; mimeo, 1970).

> window if he is tall enough, but he cannot open it without a special key. . . .
>
> Every thirty minutes throughout the night, counselors check each child through little windows in their cell doors. (*Id.* at 184, 185.)

This penal atmosphere is illustrated by the methods utilized for discipline. Although corporal punishment is forbidden, instances of it are prevalent (Duke Report at 85, 90, 114, 199). Solitary confinement is one of the "legal" forms of punishment which is practiced openly at all schools in order to discipline those who blantantly misbehave or who run away (*Id.* at 88, 113, 153, 165-167, 189, 194). Being placed in solitary confinement in the "quiet" or "meditation" room (or as it is commonly called at the schools "the jug") is not a pleasant experience:

> The jug itself consists of a small room in which a slab of rock serves as a bed. An offender must strip down to his underwear. He is permitted to read only the Bible, and he is served only two meals a day. At 5 o'clock in the evening he is given a mattress on which to sleep, at 6 o'clock the next morning the mattress is removed and the bare rock is all the boy has to rest on (*Id.* at 88; see also 133).

"This is not committment for the boy's safety or for someone else's safety. This is incarceration for punishment pure and simple." (*Id.* at 134).

At Eastern Carolina School for Boys, a visit to the "quiet room" is supposedly limited to seven consecutive days. However, the rule is circumvented by removing a boy after the seventh day only to return him immediately. Although one boy claimed to have spent twenty-one days in "the jug" a social worker explained that a week was the normal period of confinement (*Id.* at 88).

The penal atmosphere of the reformatories is reinforced by every facet of the inmates' daily routine. His mail is censored (*Id.* at 113, 153); and his daily life, regimented. At Eastern, for example, the boys march in silent single file

lines wherever they go and are required to wait at every doorway for permission to pass through (*Id.* at 48, 73-75). "March, march, march; the boys engage in marching *ad absurdium*" (*Id.* at 75). Although campuses of some of the training schools are attractive, many of the buildings are drab. Dobbs Farm was formerly a women's prison and "its buildings still reflect their penitentiary past. With the exception of one new cottage the structures are ugly, poorly lighted, badly ventilated, and anything but attractive." (*Id.* at 191). Two of the seven classrooms at Eastern are in a structure which was recently condemned as unsafe for use as a dormitory by the State Health Department (*Id.* at 45). There is neither a bathroom nor a water fountain in the building (*Id.* at 49).

The drabness and regimentation of life at the training schools is reflected in the diet and dining facilities. At Eastern, a cottage has twenty minutes to eat a meal in a dingly,colorless dining hall (*Id.* at 74). Similarly, at Dobbs Farm "the dining facilities are in abismal condition" (*Id.* at 195). To be sure the drabness of Dobbs, the formerly all black training school, is heightened in comparison to good quality food and pleasant dining hall at Samarcand Manor, which was formerly only for white girls (*Id.* at 200) and which was the only school that treated mealtime as more than another regimented period in the lives of the inmates.

The Duke Report found that the penal atmosphere of the institutions studied was reinforced by the stigma attached to children by training school personnel. As soon as he arrives at the school, a child is made to feel that he has done "something very wrong to be at the school" (*Id.* at 105). Very few people at the school talk positively about the boys. "Negativism looms over the campus and the stigma grows" (*Id.* at 106).

Although the North Carolina General Statutes proclaim that the special juvenile process is intended to "assure the protection, treatment, rehabilitation or correction which is appropriate . . ." for the youngsters (§ 7A-277) serious

attempts are not made to meet the special psychological, medical, social, and vocational needs which may differentiate a young offender from an adult (and which if filled might lead to healthy adjustment). It is with this failure in mind that one must appraise the position of the National Council of Juvenile Court Judges, that differences between adulthood and adolescence justify the denial of a jury trial to a juvenile where an adult accused of the same offense would be entitled to receive one (brief at 8, 9; see also brief of State of North Carolina at 25, 26). For example, juveniles sent to training schools are in dire need of inspiring and remedial education, but generally neither is found in North Carolina:

> Most of the young lads . . . have come from backgrounds filled with dull teaching and irrelevant curricula. They have responded with 'truancy' either in the form of skipping public school completely or by sitting restlessly and sullenly at the back of the classroom . . . Unfortunately, at the training school, they face the same academic wilderness they so desperately tried to escape (Duke Report at 50-1; see also 70, 145, 175-6).

Too many classes consist of monotone lectures read straight from the textbook by the teacher who then has students read passages out loud row after row (*Id.* at 145; see also 48, 50, 175). Such imaginative instruction as is available is overshadowed by the monotony of the teaching as a whole (*Id.* at 51-70). At Eastern, for example, the more progressive teachers are discouraged by the faculty and administration (*Id.* at 70). "From our observations . . . we realized that . . . boredom ran rampant throughout the school system" (*Id.* at 50).

Only the Juvenile Evaluation Center, Dillon, and a pilot cottage at Jackson offer group therapy (*Id.* at 188, 131). All training schools do have two or three social workers, but each is extremely overworked and carries a caseload of over 115 children (*Id.* at 93, 135-8, 171, 196). These social workers only have time to attend to those who disrupt life at the school and must ignore the quiet, although equally

troubled children, whose problems might be remedied with talk and understanding (*Id.* at 135, 196). The cottage parents (adults who supervise the living units) are untrained in counselling and most have no desire to attempt it. At Jackson, "only about four out of the forty-seven cottage parents feel the desire to listen to a boy's problem and discuss it with him in a non-defensive way." (*Id.* at 120). It should be noted that few cottage parents have more than a high school education, many are retired, and most resent their lack of prestige and low pay (*Id.* at 85-6, 120, 132).

Without proper counselling, problems stemming from the child's homelife are ignored: "neither the school nor the local court or welfare officials seriously work with the student's family while he is in training school in order to improve the environment that was responsible for his commitment" (*Id.* at 153; see also 104-5). Consequently, once a child is released he is no better equipped to deal with his family or community than he was before. Half return to the training schools (*Id.* at 154). Compare *In re Gault*, 387 U.S. 1, 21-23 (1967).

Not only do training schools ill prepare children for release by failing to deal with special social and psychological problems, but the schools also foster values which may make the child's life outside of the school more difficult (Duke Report at 73). Subservience to the authority structure of the school is paramount and exposure to the complexities of human relationships is absent. (*Id.* at 66). As a concomitant of this rigid authority structure, the schools place a premium on dependence and group-oriented behavior while discouraging initiative, creativity, and individualism (*Id.* at 66, 76, 79, 97, 99-101, 115). Except for group therapy sessions (which are provided at only three schools) there are no channels through which the children can voice displeasure, let alone alter any facet of training school life (*Id.* at 188). Proposals to establish student governments have been rejected, denying the children any training in democracy (*Id.* at 79, 100 n. 7, 115). The effect is that:

> Personal dignity and integrity are washed away in the school's efforts to control. Dependence is fostered and self-esteem remains undeveloped. Unhappiness, insecurity, anti-social behavior, and even serious crimes may result from this undeveloped personal esteem. The thwarting of independence may result in costly felonies in the future (*Id.* at 100).

Just as a child's special educational and psychological needs are ignored so are his medical needs. In fact, at Eastern, a child's financial condition may determine whether he receives dental care or undergoes an operation. One social worker explained, "if it's an emergency we worry about the money later; but if it is not, we don't proceed until we can find money. Sometimes we don't proceed." (*Id.* at 81). There are stark contrasts between the medical facilities at different schools. Dobbs Farm, the formerly all black school, has one nurse who is supposed to care for 235 girls with little money and equipment (*Id.* at 194). The formerly all white Samarcand Manor, on the other hand, has an emergency operating room and is visited by doctors and dentists (*Id.* at 200). The Duke Report concludes that "Equal treatment ought to involve paying for candy, new street clothes, and medical expenses for all the students, especially those in need. *Parens Patriae* and *In Loco Parentis* as concepts ring hollow when the responsibilities of good parents are not borne by the State in caring for its youthful wards" (*Id.* at 81). Thus North Carolina juvenile institutions present a familiar pattern: rehabilitation is a stated goal but the facilities, services, personnel and programs necessary to realize it fall far short of what is required.

Modern penological theory stresses that both young and old offender is likely to return to society and that every effort should be made to prepare him for that return and improve his capacity to adjust to the economic and social realities that he will confront. In the case of juveniles, a fair statement of the matter is that because of age it is recognized that we may be more successful in rehabilitation and thus every advantage should be given to young offenders in struc-

turing opportunities for change and improvement. Thus the juvenile court system reflects, and petitioners in no way challenge, the informality and broad discretion of judges and probation officials at juvenile court intake and at the dispositional phase. When a judge or a probation officer evaluates the dispositional alternatives available and fits them to the young offender he is exercising a discretion and an expertise in selecting and structuring such treatment.

But we fail to understand how the state's decision not to enhance the retributive aspects of incarceration when dealing with juveniles can be taken as a justification for denial of a jury trial at the adjudicative phase. Even were North Carolina, and other states, able to show that they made available a wealth of treatment options, sufficient to transform the youth into a person likely to live a healthy and adjusted life, it could still be doubted whether the state had the power to dispense with constitutionally required factfinding protections, otherwise deemed essential prior to involuntary confinement for culpable conduct. Where the state operates and maintains custodial institutions that seem to serve primarily to hold, and barely to educate or to train the young, the case for less rigorous factfinding procedures dissolves. The Court cannot simply ignore the grim reality of "rehabilitation": that the poor and the black are those usually incarcerated; that they are treated as if they have broken society's rules; and held for long periods of time—to emerge older, but basically unchanged, for the experience.

In recognition, perhaps, of both the reality of custodial incarceration in state juvenile institutions and this Court's rejection in *Gault* of the significance of a rehabilitative purpose as a justification for informality in fact-finding, North Carolina and The National Council of Juvenile Court Judges also urge that trial by jury is itself counter-rehabilitative. Thus is it said that juries will bring "the traditional delay, formality and inevitable 'clash and clamor' of adversary proceedings" (brief of National Council, 30); that the juvenile judge will now become concerned with the "technicalities of

procedure" (*Id.* at 33), that hearsay evidence will have to be excluded (*Ibid*); that the juvenile will be punished by publicity (brief of North Carolina 25); and that jury trials will delay "counselling, treatment, rehabilitation and reform of a troubled child" (brief of National Council at 32). Aspects of these contentions have been discussed in petitioners' brief and the amicus brief of the Public Defender Services for the District of Columbia and the Neighborhood Legal Service Program of Washington, D.C. Several points, however, merit a reply.

First. It should be noted (as both North Carolina (p. 28) and the National Council appear to concede (p. 35)) that no empirical evidence has been presented which corroborates, much less establishes, the premise that a jury trial impairs the health of the child or his family, or interferes with his rehabilitation. On the contrary, one may doubt that the rehabilitative prospects of a youth are fostered when court proceedings (which determine whether a state criminal law has been violated, subject the youth to lengthy incarceration and stigmatize him in the eyes of much of the community) are structured so as to deny a community judgment as to guilt solely because of age. In the instant case, for example, the black juveniles who protested what they considered blatant acts of racial discrimination against black school children are unlikely to have had their confidence and trust in society strengthened by trial before a white juvenile court judge rather than a jury representing the community as a whole—especially when the adults who demonstrated with them were entitled to trial by jury. One may suppose that it will be somewhat difficult for blacks, who have for decades sought the right to trial by a cross-section of their communities as a protection against, inter alia, case-hardened and oppressive attitudes of trial judges, cf. *State v. Holt*, 90 N.C. 749 (1884), to understand how their welfare is served by requiring them to go to trial without a jury.

Second. The notion that by granting petitions' motion for a jury trial a juvenile court is converted into a front page

circus is unreal. As in adult cases the overwhelming majority of criminal cases do not command public attention. Moreover, the newsworthiness of a case does not depend on the presence of a jury. In urban areas it is unlikely that all but the most notorious juvenile case would become a subject for newspapers, radio or television. In rural areas, the media might be concerned with the more commonplace juvenile case but it is likely that a small community would learn the nature of such occurrences and persons apprehended, whether or not reported, simply by word of mouth. So in the case at bar, despite the fact that petitioners were not entitled to a jury trial, sufficient publicity attended their adjudication as delinquents to move a national organization to issue a report describing the events involved. See *Hyde County North Carolina: School Boycott and the Roots of Conflict* (N.E.A. 1969).

We reiterate what was urged at length in petitioners' brief (pp. 21-23): there is simply no reason why a jury trial in those cases where a defendant and his counsel determine that one is in the best interests of the child must be equated with unregulated reporting. If a state believes that publicity punishes juveniles it does better exercising it powers to promote privacy and regulate disclosure rather than to deny jury trials to those juveniles who wish one. It is hardly in the interest of a youth who wishes a jury trial in order to protect himself from, for example, a case-hardened judge or one who has seen inadmissible evidence, to deny him trial by jury because he may suffer the indirect consequences of disclosure if he has a jury trial. Without a trial by jury such a youth may suffer the far more painful fate of unjustifiable incarceration, despite the existence of what a jury might find to be a reasonable doubt of guilt. *Cf. In re Winship*, 397 U.S. 358 (1970). Far more reasonable a course to protect youths from publicity is regulation of disclosure in juvenile cases, restriction of the persons who may attend court proceedings, and recognition that those juveniles who are concerned about publicity are most likely to waive their right to trial by jury. *Standards Relating to Fair Trial and Free*

Press, passim (American Bar Assoc. Project on Minimum Standards for Criminal Justice, 1966). *Cf. Patton v. United States*, 281 U.S. 276, 297 (1929).

Third. It is argued that jury trials burden the administration of justice and cause delay. Of course, jury trials may contribute to delays in court proceedings—although (1) the experience of jurisdictions that have made jury trials available, as amply documented by the only empirical evidence before the Court, submitted by the Public Defender Service for the District of Columbia and the Neighborhood Legal Service Program of Washington, D.C., strongly suggests that such burdens are not imposing, and (2) clogged court calendars are the product of a variety of factors operating on a particular court system and cannot be said to have been caused by the availability of jury trials. But, regardless of what one might say as an initial matter about the availability of trial by jury, our criminal procedure has evolved in such a manner as to make such administrative burdens clearly worth carrying when they purchase a community judgment before stigma and incarceration are imposed, *Duncan v. Louisiana*, 391 U.S. 145, 149 n. 14 (1968). The Court considered and rejected such arguments when it recently determined that the right to trial by jury was constitutionally protected for all but minor offenses despite the "administrative conveniences" that might attend judge trials, *Baldwin v. New York*, 399 U.S. 66, 73 (1970).

It is suggested, moreover, that jury trials will delay the availability to the youth of such rehabilitation as are offered by the states. This is simply contrary to fact. In North Carolina, as in most jurisdictions with which we are familiar, the juvenile authorities have ample authority to control and condition the activities of the juvenile prior to final adjudication. Section 7A-285 of the N.C. General Statutes authorizes the court "to assume immediate custody of the child," prior to hearing on the merits, and to enter such orders as are required for the child's best interests. The court may provide for physical custody of the child and is

authorized "to take the child to such place or person as is designated." Thus there is abolutely no reason why treatment of the juvenile need await final adjudication. Indeed, to so contend is merely to suggest that the state has failed in still another way to provide adequate facilities and services to young people. A state which makes available counseling and treatment to a troubled child and his family only in a facility where the child is to be separated from his home for months, if not years, of institutional living has totally failed in its obligations to young people. If this is the character of the "rehabilitative ideal," discussed by the state and the National Council, we suggest that trial by jury is more, not less, desirable. A juvenile court system which declines to assist a youth in trouble until after adjudication –and then sends him to a custodial institution–is unworthy of any special treatment under the Constitution.

Finally, petitioners submit that the premise on which the arguments of both the State and the National Council is built–that the adjudicative phase of the Juvenile Court is unique–is no longer valid. Aside from the right to jury trial at issue here–and the right to public trial–decisions of this Court, as reflected in North Carolina law, have produced a fact-finding procedure almost indistinguishable from that of a criminal case. As the American adversary system has been designed principally with the jury in view, for a number of reasons its fair administration requires maintenance of the right to jury trial. Thus it is potentially mischievous to provide for counsel, confrontation, the privilege against self-incrimination, proof beyond a reasonable doubt but not a jury trial.

This is most obvious in the case of the reasonable doubt standard which was, of course, developed and defined in the context of trial by jury. See IX Wigmore, *Evidence* § 2497 (3d Ed. 1940). Since it is plain that a state carries a far lesser burden in convincing one man rather than twelve of a defendant's guilt beyond a reasonable doubt, the constitutional standard of proof is weakened when a defendant is tried to a judge. Compare *Hibdon v. United States*, 204 F.

2d 834 (6th Cir. 1953). In addition to the sheer weight of numbers, the diversity of a jury gives substance to the reasonable doubt standard, and insures that an accused will not be convicted unless jurors of varied backgrounds and outlook concur in the judgment:

> Juries fairly chosen from different walks of life bring into the jury box a variety of different experiences, feelings, intuitions and habits. Such juries may reach completely different conclusions than would be reached by specialists in any given field. *Toth v. Quarles*, 350 U.S. 11, 17 (1955).

Moreover, a defendant is entitled to the interchange and testing of ideas before a judgment against him is rendered. *Allen v. United States*, 164 U.S. 492, 501 (1896). The verdict of a trial judge, not only represents the thinking of a single man, with all the danger of individual predispositions that this involves, it represents thinking untested by confrontation with the contrary views of others. The essential genius of the jury trial is its effect in neutralizing or diluting peculiar biases or predispositions and insuring that individual views will stand the test of confrontation and debate–that a judgment of conviction may emerge only if each juror becomes satisfied that guilt has been established beyond a reasonable doubt. Thus it is not accidental that Kalven and Ziesel have concluded:

> "If a society wishes to be serious about convicting only when the State has been put to proof beyond a reasonable doubt, it would be well advised to have jury system." (*The American Jury*, 189-90)[4]

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[4]Should juvenile judges share the views expressed in the briefs of the State of North Carolina and the National Council, as to the benign character of juvenile rehabilitation in custodial institutions, the jury applying the reasonable doubt standard is an even more essential protection. A judge who believes that adjudication of guilt is not a prelude to punishment for wrongdoing but merely a precondition to satisfying the needs of the youth is far more likely to regard rigid adherence to the reasonable doubt standard as an encumbrance to helping a youth.

In a jury case, when the defense contends that evidence that the prosecution intends to offer is inadmissible under an exclusionary rule, a hearing is held by the trial judge, out of the presence of the jury, for the purpose of determining the validity of the constitutional claim. At this hearing, of course, the substance of the evidence in question is presented to the judge. The evidence can be submitted to the jury only if the trial judge determines that it has not been secured in violation of the constitutional rights of the defendant. See *Jackson v. Denno*, 378 U.S. 368 (1964).

In *Jackson v. Denno, supra*, the Court held that this separation of functions is mandatory under the Due Process Clause of the Fourteenth Amendment, and that the task of determining the admissibility of evidence–In *Jackson,* the voluntariness of a confession–cannot be delegated to the jury. The primary basis for the decision was the Court's recognition that jurors would be unable to exclude from their consideration a truthful, but involuntary, confession. (378 U.S. at 388-89). But the dangers perceived by the Court in *Jackson v. Denno* exist whenever a single body determines both the admissibility of evidence and the guilt or innocence of the accused. It is fictitious to assume that in a close case, the judgment of the trial judge will not be influenced by a belief in guilt, derived from exposure to an inadmissible confession or constitutionally inadmissible, physical evidence.[5] *Cf. Krulewitch v. United States*, 336 U.S. 440, 453

[5]That exposure to inadmissible evidence will, in fact, influence the judgment of a judge on the ultimate issue of guilt or innocence is confirmed by Kalven & Zeisel, *The American Jury* (1966). In connection with that work, questionnaires were distributed to cooperating trial judges for the purpose of analyzing the differences in the evaluation of identical cases by a judge and jury. Trial judges indicated the result they would reach before the jury returned its verdict in 3,576 cases. The authors found that in 828 cases, the judge would have convicted the defendant of the crime charged, but the jury did not do so. (P. 110, Table 24). In thirteen percent of these cases, the judge pointed to facts that he knew but that could not be put before the jury as one explanation for the disagreement. (P. III, Table 26.)

(1949) (Mr. Justice Jackson, concurring). In the case of the young person who wishes a jury because the trial judge has seen a statement before adjudication—claimed to be inadmissible on constitutional grounds—"Absent a jury trial all questions of fact . . . are determinable by the same Judge who presides at the trial." *In re Daniel Richard D.*, 261 N.E.2d 627, 630, 27 N.Y.2d 90 (1970). Yet a major reason trial lawyers request jury trials is that the judge may have been exposed to inadmissible evidence in the course of deciding whether to admit it in evidence. *Cf. Simmons v. United States*, 390 U.S. 377, 393-94 (1968). Proper operation of constitutional exclusionary rules and other rules relating to the exclusion of evidence, requires that the determination of admissibility not be made by the body determining guilt or innocence. Trial by jury permits the separation of these functions and guarantees constitutional rights to have illegally obtained evidence and other inadmissible evidence "entirely disregarded." *Jackson v. Denno, supra*, 378 U.S. at 389.

Contagion of the trial judge by proferred evidence which he hears in ruling on its "admissibility" is only one prejudicial incident of non-jury trials. It is no exaggeration to say that bench trials deny the defendant the benefit of most evidentiary rules. This is so for several reasons. "[I]t is virtually impossible to convince an appellate court that the receipt of inadmissible evidence in a bench trial was prejudicial. Although trial judges are given great credit by appellate judges for having reasoning powers that allow them to compartmentalize their minds and segregate admissible from inadmissible evidence in arriving at a verdict, as a practical matter trial judges are no less human than jurors." II Amsterdam, Segal & Miller, *Trial Manual for the Defense of Criminal Cases*, Section 317, at p. 2-247 (1967). Furthermore, the confusion of roles of the trial judge who also tries

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Certainly, there are cases in addition to this number in which such information has some conscious or subconscious influence on the trial judge but which would not be reported in this candid fashion.

the facts tends to promote avoidance of clear cut rulings on evidentiary issues. "[I]n a bench case, some judges make it a practice to take defense objections to the admissibility of evidence under advisement, and then when it is clear that the prosecution has a sufficient case apart from the contested evidence, they will insulate themselves from reversal by announcing that they are not going to consider the evidence, but find the defendant guilty without it. This sort of evasion of tricky evidentiary issues cannot be worked in a jury trial." *Id.* at p. 2-248.

In addition, the judge frequently comes to the determination of the guilt question against a background that makes impartial appraisal of the admissible evidence impossible. Informed by prior contacts with the case or with the defendant that he is unable to avoid, the judge who sits on the guilt issue almost invariably knows of a prior record and and other unfavorable personal facts. Moreover, he approaches determinations of credibility with attitudes hardened by observation of prior trials to which the defendant was not a party; and it is no accident, in particular, that he tends to believe police witnesses, since the judge has probably heard the same officer testify against a dozen, or a hundred, guilty defendants. The impact of these factors varies from case to case, but it is not unusual for one or all of them to preclude a bench-tried defendant from having his guilt or innocence fairly heard on the admitted and admissible evidence and nothing else. It is of the very nature of the jury to bring a healthy skepticism to appraisal of the credibility of witnesses whose veracity a judge may not test simply because he has relied on the witness in the past. This function of the jury is especially significant in juvenile courts where the officers are likely to be closely related in their work to the juvenile court judge.

The judge's dual role in a non-jury trial also obscures, by commingling, the questions of law and fact which it is the defendant's right to have fairly determined and fairly reviewed. *In re Gault*, 387 U.S. 1 (1967). In a jury trial,

the principles of law applied are clearly articulated, since the judge must charge them to the jury. Limited but meaningful review is available of the jury's factual determination under the legal principles charged by the court. By contrast, where a judge is the trier of fact, no clear cut articulation or decision of either legal or factual questions is ordinarily made, and appellate review is severely hamstrung. Bench trials thus may not merely allow, but rather tend to promote arbitrariness; and, at best, they deprive the defendant of the essential conditions for a clear, visible and regular decision of the separate legal and factual questions upon which his conviction depends.

Thus, regardless of the preference one may have for or against the jury in the abstract it is obvious that a jury compliments the "structure and style of the criminal process–the supporting framework and the subsidiary procedures–" *Duncan v. Louisiana*, 391 U.S. 143, 149, n. 14 (1918). This is what we understand Mr. Justice White to have meant in *Duncan* when he wrote that a jury trial "is fundamental in the context of the criminal processes maintained by the American states." (*Ibid.*) The decisions in *Gault* and *In re Winship*, 397 U.S. 358 (1970) have constitutionally mandated an adjudicative phase of juvenile court proceedings so similar to that which is found in criminal proceedings that a right to jury trial is required in juvenile court for the same reasons that it is required in adult proceedings. *Duncan, supra*, 391 U.S. at 148, 149, 155-158.

CONCLUSION

WHEREFORE, petitioners pray that the judgment below be reversed.

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